Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

SADIE MAIDEN, as Personal Representative of the Estate of LEITH MAIDEN, Deceased,

Petitioner,

vs.

HENRY JAMES ROZWOOD, BETTY JO SZABO, PAUL LEONARD TROY, KARL DOUGLAS MYLES, SOUTHGATE REGIONAL CENTER, MICHIGAN DEPARTMENT OF HEALTH,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

FIEGER, FIEGER, SCHWARTZ & KENNEY, P.C.
By: GEOFFREY N. FIEGER (P30441)
JEREMIAH J. KENNEY (P24810)
Attorneys for Petitioner
19390 West Ten Mile Road
Southfield, Michigan 48075-2463
(248) 355-5555

BENDURE & THOMAS
By: MARK R. BENDURE (P23490)
Counsel of Record for Petitioner
577 East Larned, Suite 210
Detroit, Michigan 48226-4392
(313) 961-1525

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

I. WHETHER A STATE ACTOR, SERVING A SECURITY FUNCTION, WHO PARTICIPATES IN KILLING AN UNARMED PERSON ENTRUSTED TO HIS CONTROL WHILE RESTRAINING THAT PERSON'S LIBERTY, MAY BE HELD ACCOUNTABLE UNDER 42 U.S.C. § 1983 FOR THE USE OF OBJECTIVELY UNREASONABLE FATAL FORCE, UNDER THE FOURTH AMENDMENT PRINCIPLES OF *GRAHAM v. O'CONNOR*, 490 U.S. 386 (1989) AND *TENNESSEE v. GARNER*, 471 U.S. 1 (1985) (AS PETITIONER CONTENDS) OR WHETHER LIABILITY IS LIMITED TO THE FOURTEENTH AMENDMENT SUBSTANTIVE DUE PROCESS "DELIBERATE INDIFFERENCE" STANDARD (AS THE COURT OF APPEALS RULED).

PARTIES TO THE PROCEEDINGS

Petitioner Sadie Maiden is the Personal Representative of the Estate of Leith Maiden, Deceased. Under Michigan law, M.C.L.A. 600.2922(2), she is the party authorized to pursue a wrongful death action seeking redress for the death of Leith Maiden, who died while under the care of Respondents.

Leith Maiden was a resident of Respondent Southgate Regional Center, a facility operated by Respondent Michigan Department of Health. Respondents Henry James Rozwood, Paul Leonard Troy, Karl Douglas Myles and Betty Jo Szabo were employed at Southgate Regional Center. Respondents Rozwood and Troy killed Mr. Maiden in the presence of Respondents Myles and Szabo, who did not intervene.

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OPINIONS AND ORDERS BELOW

On April 11, 1997, the United States District Court for the Eastern District of Michigan, Southern Division granted Respondents' Motion for Summary Judgment by unpublished Opinion and Order (19a-25a). The Court of Appeals for the Sixth Circuit affirmed by unpublished Opinion of May 23, 2000 (1a-7a). Petitioner's timely Motion for Rehearing was denied by unpublished Order of July 13, 2000 (65a-66a).

SUPREME COURT JURISDICTION

Petitioner invokes the certiorari jurisdiction conferred on this Court by 28 U.S.C. § 1254(1), which provides:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> > By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

This Petition, filed within 90 days after denial of Petitioner's timely Motion for Rehearing, is timely under this Court's Rule 13.3.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This action seeks redress under 42 U.S.C. § 1983, which provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . . "

The principal provision of the United States Constitution invoked by Petitioner is § 1 of the Fourteenth Amendment, which states:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws" (emphasis supplied).

The Fourteenth Amendment incorporates, and makes applicable to the States, the Fourth Amendment:

> "*The right of the people to be secure in their persons*, houses, papers, and effects, *against unreasonable* searches and *seizures, shall not be violated*, and no Warrants shall issue, but upon

probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized" (emphasis supplied).

STATEMENT OF THE CASE

Introduction

Leith Maiden was suffocated or asphyxiated by employees of an agency of the State of Michigan until he expired from oxygen deprivation.[1] This killing occurred while Respondents were restraining Mr. Maiden. The ultimate legal issue is whether the applicable constitutional standard for measuring the responsibility of the killers is that of "deliberate indifference" or "objectively unreasonable force".

The Killing of Leith Maiden

The decedent was a resident of a state mental health facility suffering from mental disturbances. A fracas ensued, and Defendants Rozwood and Troy detained Maiden by bringing him to the ground, face down. With Maiden on the ground, Rozwood and Troy laid across Maiden's back for 5 to 10 minutes, while Myles and Szabo watched. In doing so, Rozwood and Troy caused positional or compression asphyxia, literally killing Maiden by oxygen deprivation.

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[1] The facts are taken from information obtained during discovery in an earlier suit filed in Michigan State court and from the Complaint filed in the federal action (8a-18a).

The Earlier State Court Action

Petitioner initially filed suit in Wayne County Circuit Court, the Michigan Court of general jurisdiction. The Complaint alleged that the individual Respondents had engaged in "gross negligence", actionable under the Michigan state law of government immunity, M.C.L.A. 691.1407(2)(c).

Following discovery, these Respondents moved for summary disposition under M.C.R. 2.116(C)(10) ("no genuine issue as to any material fact"), the local counterpart to Fed. R. Civ. P. 56(c).[2] They asserted that the facts did not show the "gross negligence" [statutorily defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results"] necessary to recover under state law. Ultimately, in a divided decision, the Michigan Supreme Court held that the facts did not show "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." *Maiden v. Rozwood*, 461 Mich. 109; 597 N.W.2d 817 (1999) (24a-64a).

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[2] The state court action was dismissed against the Southgate Regional Center and State of Michigan on the separate ground that they are immune from tort liability under State law, M.C.L.A. 691.1407(1).

Petitioner's Federal Action Under 42 U.S.C. § 1983

Petitioner had sought to amend the Michigan action to add a Count seeking relief under 42 U.S.C. § 1983. The State court judge denied the amendment motion.

Petitioner then asserted her federal claim by separate federal suit (8a-18a). The Complaint alleges, *inter alia*, that Respondents undertook to "physically restrain" the decedent (¶ 15), in the course of which they suffocated him (¶¶ 16-17), depriving him of rights existing under the United States Constitution (¶ 22), including the Fourteenth Amendment (¶ 24), by restraining him without proper cause [¶ 25(d)] and "[u]sing excessive force" [¶ 25(e)].

The Outcome-Determinative Nature Of The Constitutional Characterization

The District Court was obligated to apply the state law of *res judicata*. 28 U.S.C. § 1738; *Migra v. Warren City School District Board of Education*, 465 U.S. 75, 91 (1984); *Allen v. McCurry*, 449 U.S. 90 (1980). Michigan follows the view of the Restatement of Judgments, 2d, § 25, pp. 213-214: where the court in which the first action was filed would not entertain a different theory of recovery arising out of the same facts, the first adjudication precludes only a later suit asserting the "same claim". A later suit asserting the "omitted" claim which the first court would not entertain remains viable. *Pierson Sand v. Keeler Brass*, 460 Mich. 372, 378-379, 382, 385, 387; ___ N.W.2d ___ (1999); *Bergeron v. Busch*, 228 Mich. App. 618, 625; 579 N.W.2d 124 (1998). See also *JAM Corp. v. AARO Disposal*,

Inc., 461 Mich. 161; ___ N.W.2d ___ (1999); *Venuto v. Witco Corp.*, 117 F.3d 754 (3rd Cir. 1997).

For this reason, the nature of the constitutional standard is critical. Concededly, "deliberate indifference", if that is the standard, is indistinguishable from gross negligence under Michigan law, "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results". If "deliberate indifference" is the constitutional standard, it is the "same claim" as Michigan gross negligence, and therefore barred by *res judicata*.

Conversely, "objectively unreasonable force" looks to quality of the conduct, not the mental state of the actor. If "objectively unreasonable force" is the standard, the § 1983 action is not the "same claim" as state law gross negligence, and is not barred under the Michigan law of *res judicata*.

The Lower Courts' Adoption Of "Deliberate Indifference" As The Constitutional Standard For State Actors, Other Than Police Officers, Who Personally Participate In Killing While Attempting To Restrain Liberty.

Respondents sought summary judgment of Petitioner's federal § 1983 action on *res judicata* grounds.[3]

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[3] The institutional Respondents also sought summary judgment on Eleventh Amendment grounds. Petitioner acknowledges that the State is not a "person" subject to § 1983 liability. The status of the Southgate Regional Center is less clear. Although it claimed Eleventh Amendment immunity, the District Court did not reach this issue, instead dismissing the claims against that entity on *res judicata* grounds.

Following oral argument (67a-76a), the District Court granted the motion (19a-25a).

The Court of Appeals affirmed, basing its decision on the view that the liability of all Respondents turned on the "deliberate indifference" standard:

> "[The District] court found that Maiden was required to show that Defendants acted with 'deliberate indifference' to sustain her § 1983 claim under *Davidson v. Cannon*, 474 U.S. 334, 347-48 (1986). *See also Stemler v. City of Florence*, 126 F.3d 856, 870 (6th Cir. 1997) (noting that deliberate indifference standard applies to substantive due process claims raised by people in the custody of the state); *Durham v. Nu'Man*, 97 F.3d 862, 869 (6th Cir. 1996) (applying deliberate indifference standard to determine doctor's liability under § 1983 for failing to properly treat a state mental patient).
>
> The district court then found that Maiden's prior 'gross negligence' claims in state court precluded her § 1983 claim in federal court by relying on *Longstreth v. Franklin Cty. Children Services*, No. 93-3190, 1993 WL 533484 (6th Cir. Dec. 21, 1993) (unpublished per curiam) (plaintiff's prior state gross negligence claims precluded § 1983 deliberate indifference claim under Ohio's res judicata doctrine, which is similar to that of Michigan's res judicata)."
>
> * * *
>
> "We affirm the district court's rulings on these issues."

Petitioner sought rehearing, again contending that, as to those charged with responsibility for having personally participated in the killing of Mr. Maiden, the constitutional standard was "objectively unreasonable force". Disagreeing, the appellate court denied rehearing (65a-66a).

THE REASONS WHY CERTIORARI SHOULD BE GRANTED

The Complaint alleges that the individual Respondents, acting under color of state law, personally participated in killing a man by using unreasonable, lethal force, while restraining Mr. Maiden's liberty. Certiorari should be granted to review the conclusion that the Constitution permits a state actor to kill an unarmed person, committed to his care, through excessive and unreasonable force.

The decision below is fundamentally inconsistent with this Court's decisions in *Graham v. Connor*, 490 U.S. 386, 395 (1989) and *Tennessee v. Garner*, 471 U.S. 1, 7 (1985), which recognized the Fourth Amendment right[4] to be free from objectively unreasonable force in the deprivation of liberty. As the Court explained in *Graham*:

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[4] As the Constitution is principally a constraint on the federal government, it is technically accurate to say that the right in question exists under the Fourteenth Amendment, which makes applicable to the States the protections which the Fourth Amendment provides against the federal government. *Mapp v. Ohio*, 367 U.S. 643 (1961).

> "[A]ll claims that law enforcement officers have used excessive force – deadly or not – in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach. Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims" (footnote omitted).

Similarly, the observation in *Garner* is on point:

> "Whenever an officer restrains the freedom of a person to walk away, he has seized that person. . . . [T]here can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." (citation omitted).

Graham and *Garner* establish the "objectively unreasonable force" standard where deadly force is used by a state actor in restraining liberty. This Court should review the appellate court's conclusion that Leith Maiden (and, by extension, others who are in the non-penal custody of government) have no constitutionally protected right to be free from objectively unreasonable deadly force in the restraint of liberty.

The lower court's substitute of a "deliberate indifference" standard, as the measure of those who personally killed Mr. Maiden, finds no support in this Court's decisions. Those decisions have embraced a "deliberate

indifference" standard for assessing the constitutionality of conduct which permits the infliction of injury or death *by another, typically one who is not himself or herself acting under color of state law.* See *e.g. Farmer v. Brennan*, 511 U.S. 825 (1994) (applying "deliberate indifference" standard to suit against prison official charged with liability for exposing transsexual inmate to homosexual rape by other inmates).

Neither Respondents nor the Court of Appeals were able to find or cite a case adopting that standard in assessing the constitutionality of conduct by *a state actor who directly participates in a killing while restraining or attempting to restrain liberty.* Indeed, the cases cited by the appellate court underscore the distinction between personal involvement in restraining liberty ("excessive force") and responsibility for exposing to a risk of injury at the hands of others ("deliberate indifference").

The Court of Appeals relied on *Davidson v. Cannon*, 474 U.S. 344 (1986), and *Stemler v. City of Florence*, 126 F.3d 856, 870 (6th Cir. 1997) (Opinion, pp. 4-5; 6a). That reliance is badly misplaced. Both of those cases involve § 1983 liability for failure to protect someone *who was injured by a non-state actor.* Neither does *Durham v. Nu'Man*, 97 F.3d 862, 869 (6th Cir. 1996) support the ruling below. The "deliberate indifference" standard in that case was applied to a doctor's failure to properly treat injuries *caused by another.*

In fact, on careful examination, *Durham* recognizes that government employees, not police officers, performing a security function, have the same obligation to refrain from using unreasonable lethal force as that

imposed on police officers in *Graham* and *Garner*. The *Durham* Court concluded that a hospital security officer and nurse who failed to intervene in the use of excessive force were subject to the *same* constitutional duty as a police officer (97 F.3d at 868).

The decision below applies the "substantive due process"/"deliberate indifference" approach which this Court has rejected in the deprivation of liberty setting of *Graham* and *Garner*. Certiorari should be granted to review the ruling below and clarify the applicable constitutional standard.

The issue posed does not only involve significant questions of constitutional jurisprudence. It involves the fundamental relationship between agents of State government and citizens entrusted to their care. This Court should review the horrifying pronouncement that the Constitution allows persons acting under color of state law to kill the mentally ill through unreasonable lethal force.

WHEREFORE, Petitioner prays that this Honorable Court grant her Petition for Writ of Certiorari.

Respectfully submitted,

FIEGER, FIEGER, SCHWARTZ & KENNEY, P.C.

GEOFFREY N. FIEGER (P30441)
Attorneys for Petitioner
19390 West Ten Mile Road
Southfield, Michigan
48075-2458
(248) 355-5555

BENDURE & THOMAS

MARK R. BENDURE (P23490)
Attorneys of Record for Petitioner
577 East Larned, Suite 210
Detroit, Michigan
48226-4392
(313) 961-1525

Dated: October 9, 2000

NOT FOR PUBLICATION

No. 97-1554

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SADIE MAIDEN, as Personal Representative of the Estate of Leith Maiden, deceased,

Plaintiff – Appellant,

HENRY JAMES ROZWOOD; KARL DOUGLAS MYLES; BETTY JO SZABO; SOUTHGATE REGIONAL CENTER; MICHIGAN DEPARTMENT OF HEALTH;

Defendants – Appellees,

PAUL LEONARD TROY,

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

(Filed May 23, 2000)

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Sixth Circuit Rule 28(g) limits citation to specific situations. Please see Rule 28(g) before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

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BEFORE: GUY, BOGGS, and SUHRHEINRICH, CIRCUIT JUDGES.

PER CURIAM. Plaintiff-Appellant Sadie Maiden ("Maiden") appeals from the district court's grant of summary judgment for Defendants-Appellees ("Defendants") Henry James Rozwood, Karl Douglas Myles, Betty Jo Szabo, Southgate Regional Center ("Southgate"), the Michigan Department of Health ("Michigan"), and Defendant Paul Leonard Troy ("Troy")[1] on the grounds of res judicata. We affirm for the reasons stated herein and for the reasons stated in the district court's opinion.

I.

Maiden's decedent, Leith Maiden, was a resident patient at Southgate who suffered from various mental disturbances. On June 9, 1994, a fellow resident harassed the decedent, which caused the decedent to become aggressive. Southgate employees, who are individual defendants in this case, applied a "take-down" to physically restrain the decedent, which caused his death by asphyxiation.

On January 24, 1996, Maiden filed a wrongful death suit in Wayne County Circuit Court alleging gross negligence by Defendants as required by Michigan's governmental immunity statute. *See* Mich. Comp. Laws Ann. § 691.1407(2)(c) (West 1987) (employees of governmental agencies are immune from tort liability if their conduct "does not amount to gross negligence"). Defendants filed

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[1] Troy is not a party to this appeal.

a motion for summary disposition and after a hearing on November 22, 1996, the court announced from the bench that it would grant summary disposition for Defendants.

On December 10, 1996, Maiden moved to amend her complaint to add a 42 U.S.C. § 1983 claim. The circuit court formally granted Defendants' motion for summary disposition on December 20, 1996, and dismissed Maiden's complaint with prejudice. Maiden's motion to amend was later denied on January 13, 1997.

On January 24, 1997, Maiden filed her § 1983 claim in federal district court alleging that Defendants, "evidenced a reckless course of conduct demonstrating a substantial lack of concern of [the decedent's] well-being" that resulted in his death. On February 19, 1997, Defendants filed a motion for summary judgment on the grounds of res judicata.[2] The district court agreed and granted summary judgment for Defendants. Maiden timely appealed, but her appeal was administratively stayed pending the outcome of the state appeals, including the Michigan Supreme Court's affirmance of the circuit court's summary disposition. *See Maiden v. Rozwood*, 597 N.W.2d 817, 827 (Mich. 1999).

The issue on appeal is whether Maiden's § 1983 claim is barred by her prior state action on the grounds of res judicata. We review *de novo* a district court's summary judgment dismissal of a plaintiff's claims on res judicata

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[2] Southgate and Michigan also filed a motion to dismiss on the grounds of Eleventh Amendment immunity. However, the district court found that it could dispose of this case on the grounds of res judicata and declined to address their motion to dismiss.

grounds. *See Gargallo v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 918 F.2d 658, 660 (6th Cir.1990). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *See* FED. R. CIV. P. 56(c).

II.

Maiden argues that res judicata is inapplicable because her § 1983 claim is not the same claim as her prior state "gross negligence" claims. She also contends that res judicata should not bar her § 1983 action because she did not have an opportunity to pursue that claim in state court when her motion to amend was denied. Finally, she argues that Michigan's res judicata should not bar her suit because it would undermine federal interests in her § 1983 claim.

The district court held that Maiden's § 1983 claim was barred by the res judicata effect of her prior state action because the § 1983 claim stemmed from the same operative facts and required the same evidence as the state claim. The court noted that the Full Faith and Credit Statute, 28 U.S.C. § 1738, "directs a federal court to refer to the preclusion law of the State in which judgment was rendered." *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985). Consequently, if the state would accord the judgment preclusive effect, then the federal court must also give the judgment preclusive effect unless Congress has expressly or impliedly created an applicable exception to § 1738. *See id.* at 386.

The district court then applied Michigan's res judicata doctrine to find that Maiden's § 1983 claim was

barred by her prior state action. Michigan's doctrine of res judicata requires that: "(1) the first action be decided on the merits, (2) the matter contested in the second case was or could have been resolved in the first, and (3) both actions involve the same parties or their privies." *Board of Cty. Road Comm'rs v. Schultz*, 521 N.W.2d 847, 850 (Mich. Ct. App. 1994) (citations omitted). A Michigan appellate court described its res judicata doctrine as follows:

> Michigan has adopted the "broad" application of res judicata, which bars claims arising out of the same transaction that plaintiff could have brought but did not, as well as those questions that were actually litigated. The doctrine of res judicata applies equally to facts and law. The test for determining whether two claims arise out of the same transaction and are identical for res judicata purposes is whether the same facts or evidence are essential to the maintenance of the two actions.

Jones v. State Farm Mut. Auto. Ins. Co., 509 N.W.2d 829, 834 (Mich. Ct. App. 1993) (citations omitted), *modified on other grounds, Patterson v. Kleiman*, 526 N.W.2d 879 (Mich. 1994).

The district court then compared the claims raised in Maiden's prior state action with her federal suit. The court found that the § 1983 claim rested upon the same operative facts as her prior state claim action because both sought to recover for the same conduct that allegedly caused the decedent's death. In her prior state action, Maiden was required to prove that Defendants acted with gross negligence, which is "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." Mich. Comp. Laws Ann. § 691.1407(2)(c) (West 1987). Similarly, the court found

that Maiden was required to show that Defendants acted with "deliberate indifference" to sustain her § 1983 claim under *Davidson v. Cannon*, 474 U.S. 344, 347-48 (1986). *See also Stemler v. City of Florence*, 126 F.3d 856, 870 (6th Cir. 1997) (noting that deliberate indifference standard applies to substantive due process claims raised by people in the custody of the state); *Durham v. Nu'Man*, 97 F.3d 862, 869 (6th Cir. 1996) (applying deliberate indifference standard to determine doctor's liability under § 1983 for failing to properly treat a state mental patient).

The district court then found that Maiden's prior "gross negligence" claims in state court precluded her § 1983 claim in federal court by relying on *Longstreth v. Franklin Cty. Children Services*, No. 93-3190, 1993 WL 533484 (6th Cir. Dec. 21, 1993) (unpublished per curiam) (plaintiff's prior state gross negligence claims precluded the § 1983 deliberate indifference claim under Ohio's res judicata doctrine, which is similar to that of Michigan's res judicata).

The district court also rejected Maiden's argument that she was precluded from asserting her § 1983 claim when the state court denied her motion to amend her complaint. We affirm the district court's rulings on these issues. Additionally, we reject Maiden's argument that federal interests in § 1983 justify an exception to the res judicata effect of a prior state action. *See Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 83-85 (1984) (finding that § 1983 does not justify an exception to 28 U.S.C. § 1738 and the application of res judicata).

III. CONCLUSION

For the foregoing reasons, we **AFFIRM.**

U.S. DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SADIE MAIDEN, as Personal Representative of the Estate of LEITH MAIDEN, Deceased,

Plaintiff,

v

HENRY JAMES ROZWOOD, PAUL LEONARD TROY, KARL DOUGLAS MYLES, and BETTY JO SZABO, SOUTHGATE REGIONAL CENTER, and the MICHIGAN DEPARTMENT OF HEALTH Jointly and Severally

Defendants.

Case No: 97-70325
HON. PATRICK J. DUGGAN
Magistrate Judge Pepe

REBECCA S. EATON (P45331)
GEOFFREY NELS FIEGER (P30441)
Fieger, Fieger & Schwartz, P.C.
Attorneys for Plaintiff
19390 W. Ten Mile Road
Southfield, MI 48075
(810) 355-5555

COMPLAINT AND JURY DEMAND

A civil action between these parties or other parties arising out of the transaction or occurrence alleged in the complaint has been previously filed in the Wayne County Circuit Court, where it was given a docket number of

95-602930-NH and was assigned to Judge Michael Talbot. The action is currently pending in the Michigan Court of Appeals but has not been assigned a docket number.

NOW COMES Plaintiff, SADIE MADIEN [sic], as Personal Representative of the Estate of LEITH MAIDEN, Deceased, by and through her attorneys FIEGER, FIEGER & SCHWARTZ, P.C., and for her Complaint against the above-named Defendants, states as follows:

1. Plaintiff, SADIE MAIDEN, is the duly appointed Personal Representative of the Estate of LEITH MAIDEN, Deceased, per an order of the probate court of the County of Wayne.

2. That at all times relevant hereto, Plaintiff, SADIE MAIDEN, Personal Representative of the Estate of Leith Maiden, Deceased, was a resident of the City of Detroit, County of Wayne, State of Michigan.

3. The Defendant SOUTHGATE REGIONAL CENTER and the MICHIGAN DEPARTMENT OF HEALTH, were agencies conducting business continually in the City of Southgate, Wayne County, Michigan.

4. That at all times relevant hereto, Defendant, HENRY JAMES ROZWOOD, was a resident of the City of Allen Park, County of Wayne, State of Michigan.

5. That at all times relevant hereto, Defendant, BETTY JO SZABO, was a resident of the City of Taylor, County of Wayne, State of Michigan.

6. That at all times relevant hereto, Defendant, PAUL LEONARD TROY, was a resident of the City of Detroit, County of Wayne, State of Michigan.

7. That at all times relevant hereto, Defendant, KARL DOUGLAS MYLES, was a resident of the City of Detroit, County of Wayne, State of Michigan.

8. That at all times relevant hereto, Defendants, SOUTHGATE REGIONAL CENTER and the MICHIGAN DEPARTMENT OF HEALTH, owned and operated a residential health care facility and/or nursing home known as SOUTHGATE REGIONAL CENTER, located on 16700 Pennsylvania Road, City of Southgate, County of Wayne, State of Michigan.

9. That the amount in controversy herein exceeds Ten Thousand Dollars and this matter is otherwise properly before this Court.

10. That the Defendant SOUTHGATE REGIONAL CENTER operated by the MICHIGAN DEPARTMENT OF HEALTH is a mental health facility or institution established to provide or engage in providing shelter, food and general care to mentally or disabled persons as defined in MCL 330.1500.

11. That Plaintiff's decedent, Leith Maiden, who on July 9, 1994 was 28 years old, was accepted and admitted by Defendant SOUTHGATE REGIONAL CENTER as a patient and/or "resident" as that term is defined in MCL 330.1500, at Southgate Regional Center Facility and/or institution.

12. That after his admission to Defendant's facility LEITH MAIDEN suffered behavioral problems. Psychiatric and medical records indicated a physical response to Decedent's behavioral problems would be harmful and counter-productive. Further, that behavioral problems

were well-known to the employees, agents, and/or servants of the Southgate Regional Center facility, including the individual Defendants.

13. That following its acceptance of Plaintiff's Decedent, LEITH MAIDEN, as a patient and/or resident, Defendant SOUTHGATE REGIONAL CENTER was under a continuing duty, both under the Michigan Mental Health Code and the common law to exercise reasonable care and the provision of care, treatment, housing and assistance to LEITH MAIDEN in light of his known condition and limitations.

14. That on or about June 9, 1994, at approximately 4:00 p.m., a fellow resident was "picking at Leith Maiden" and Leith Maiden was as a consequence provoked and became aggressive with employees, agents and/or servants of the Southgate Regional Center.

15. That after a few minutes, the Center's employees, agents and/or servants, including the individual Defendants, began to physically restrain Leith Maiden, even though it was known by them that a physical response to the decedent's outburst was not advisable and contradicted per his records with them.

16. That thereafter, the Center's employees, agents and/or servants engaged in a two-man "take-down" of Leith Maiden to the floor, one or more of the Defendants then held his neck and shoulders. After taking Leith Maiden down to the floor, one more of the Defendants then held his fact [sic] down to the floor, by way of grasping the back of the lower part of his head and/or his upper neck, holding him in such a position so as to prevent him from breathing for an extended period of

time, either by virtue of the position in which he was being held or by compressing his airway.

17. That as a result of the activities described in the preceding paragraph, Leith Maiden was caused to be suffocated to death.

18. That after holding him in the described position for 5 to 10 minutes, the Defendants released their hold on him and Leith Maiden was discovered to be unresponsive and not breathing. CPR was attempted and was not successful in resuscitating him. Mr. Maiden was transported to a nearby hospital where, after additional unsuccessful resuscitative measures were attempted, he was pronounced dead.

19. That the Wayne County Medical Examiner found that Leith Maiden died from asphyxiation i.e., suffocation, and the said suffocation was either positional in nature, or was from compression of his airway.

20. That the Defendants' actions evidenced a reckless course of conduct demonstrating a substantial lack of concern of Leith Maiden's well being in light of his known conditions and limitations, resulting in his death on June 9, 1994.

COUNT I

DIRECT VIOLATION OF CIVIL RIGHTS, 42 USC § 1983 BY DEFENDNATS ROZWOOD, SZABO, TROY, MYLES, AND SOUTHGATE REGIONAL CENTER

21. That Plaintiff hereby realleges each and every allegation contained in Paragraphs 1 through 20 as if fully set forth herein.

22. That Defendants, HENRY JAMES ROZWOOD, BETTY JO SZABO, PAUL LEONARD TROY, KARL DOUGLAS MYLES and the SOUTHGATE REGIONAL CENTER, individually and acting in concert with each other, acting under color of state law, maliciously, oppressively and wantonly, with callous disregard of the Plaintiff's rights, subjected Plaintiff's decedent, Leith Maiden, to a deprivation of his rights, privileges and immunities secured by the Constitution of the United States of America, by depriving him of his right to life without due process of law.

23. That the actions and omission of acts by all Defendants, individually and acting in concert with each other, acting under color of state law, was unreasonable, oppressive and performed knowingly, deliberately and intentionally, and with gross negligence, callousness, reckless indifference to Plaintiff's decedent's well being and in reckless disregard of Plaintiff's decedent's safety and liberty with intent for Plaintiff's decedent to suffer unnecessarily due to the failure of the Southgate Regional Center to properly train, suprvise, develop and implement policies on the preservation of life and of all Defendants to follow proper governmental policies and

procedures in violation of of [sic] 42 USC § 1983 and the 14th Amendment to the United States Constitution and by reason of which Plaintiff is entitled to compensatory and punitive damages.

24. That the conduct of each Defendant, individually and as agents of the Southgate Regional Center, deprived Plaintiff's decedent, Leith Maiden, of his clearly established rights, privileges and immunities in violation of the 14th Amendment to the Constitution of the United States and of 42 USC §1983.

25. That the conduct of each Defendant, individually and as agents of the Southgate Regional Center, was, pursuant to and in execution and implementation of officially sanctioned policies, ordinances, regulations, customs and decisions of Defendant, Southgate Regional Center, and each of the named Defendants, individually and as agents of the Southgate Regional Center, exhibited a deliberate indifference by gross negligence and/or engaged in omissions to breach Plaintiff's public safety and liberty, said acts and omissions performed maliciously, oppressively and with reckless and careless disregard, thereby causing a constitutional deprivation of the Plaintiff's individual rights by the following acts and/or omissions:

a. Failure to train employees in the proper methods of physical restraint and verbal redirection so as not to cause harm or death to the Plaintiff's decedent, Leith Maiden, such omitted training being a grossly negligent act which resulted in the death of Leith Maiden.

b. Failure to hire individuals who would not pose a potential danger to Plaintiff's decedent, Leith

Maiden, due to their inability to follow the proper procedure with respect to verbal redirection and physical restraint of Plaintiff's decedent, Leith Maiden.

c. Knowingly and recklessly hiring and training employees who improperly performed "physical management" of Leith Maiden, causing his death.

d. Physically restraining the Plaintiff's decedent, Leith Maiden, without proper cause, thereby depriving him of his life without due process of law.

e. Using excessive force against the Plaintiff's decedent, Leith Maiden, depriving him of his life without due process of law.

f. Any and all other duties discovered during the course of litigation.

26. That the conduct of each Defendant, individually and as agents for Defendant, Southgate Regional Center, personally participated in the implementation and execution and omissions of the official policies, training ordinances, regulations and/or customs referred to above.

27. That the Southgate Regional Center, and each of the Defendants individually and as agents for the Defendant, Southgate Regional Center, had a duty to adequately train and supervise all employees to properly care for, supervise and provide care and treatment of Plaintiff's decedent, Leith Maiden, and not be grossly negligent or using conduct amounting to a reckless indifference for the personal life and liberty guaranteed by the Constitution of the United States.

28. That all acts against the Plaintiff's decedent, Leith Maiden, were done pursuant to the governmental customs, policies, ordinances, regulations, and decisions of the Southgate Regional Center, and that the death of Leith Maiden was the result of the Southgate Regional Center's policies, customs, regulations and decisions made by its lawmakers and/or by those officials whose edicts and acts represent an official policy and therefore, the Southgate Regional Center, itself, is responsible for the injuries caused to the Plaintiff's decedent, Leith Maiden.

29. That the acts of the Defendants were the proximate cause of death sustained by the Plaintiff's decedent, Leith Maiden, while the Defendants were then and there acting under the color of the authority of the State of Michigan.

30. That as a direct and proximate result of Defendants', individually and as agents for the Southgate Regional Center, breaches of each of the aforementioned conduct, and omissions, Plaintiff's and her decedent have suffered the following damages:

a. Asphyxiation and death as a consequence thereof;

b. Pain, suffering and emotional distress experienced by Leith Maiden while he remained conscious, and up to the time he became comatose;

c. Medical and funeral expenses;

d. Any and all other damages which the triers of fact consider fair and equitable under all of the circumstances.

WHEREFORE, Plaintiff, SADIE MADIEN [sic], as Personal Representative of the Estate of Leith Maiden, Deceased, prays for a judgment in her favor and against all Defendants for an amount in excess of Ten Thousand Dollars ($10,000.00), which the jury deems fair and equitable under all of the circumstances, together with interest and costs.

COUNT II

Wrongful Death

31. That Plaintiff hereby realleges each and every allegation contained in Paragraphs 1 through 30 as if fully set forth herein.

32. That as a direct and proximate result of the acts and omissions constituting negligence by the Defendants, the Decedent's estate suffered and request all damages allowable under the Michigan Wrongful Death Statute, MCL 600.2922, and hereby incorporates all the elements of damages as set forth herein.

WHEREFORE, Plaintiff, Sadie Madien [sic], as Personal Representative of the Estate of LEITH MAIDEN, Deceased, prays for a judgment in her favor and against all Defendants for an amount in excess of Ten Thousand Dollars ($10,000.00), which the jury deems fair and

equitable under all of the circumstances, together with interest and costs.

Respectfully submitted,

FIEGER, FIEGER & SCHWARTZ, P.C.

/s/ Rebecca S. Eaton
REBECCA S. EATON (P45331)
GEOFFREY N. FIEGER P-30441
Attorney for Plaintiffs
19390 West Ten Mile Road
Southfield, MI 48075
(810) 355-5555

Dated: January 22, 1997

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SADIE MAIDEN, as Personal Representative of the Estate of LEITH MAIDEN, Deceased,

Plaintiff,

v.

HENRY JAMES ROZWOOD, BETTY JO SZABO, PAUL LEONARD TROY, KARL DOUGLAS MYLES, SOUTHGATE REGIONAL CENTER, and the MICHIGAN DEPARTMENT OF HEALTH, jointly and severally,

Defendants.
_____/

CASE NO.: 97-CV-70325-DT

HON. PATRICK J. DUGGAN

OPINION AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

At a session of said Court, held in the U.S. District Courthouse, City of Detroit, County of Wayne, State of Michigan on April 11, 1997

PRESENT:

THE HONORABLE PATRICK J. DUGGAN
U.S. DISTRICT COURT JUDGE

This matter is before the Court on defendants'[1] motion for summary judgment.[2] A hearing on this motion was held on April 10, 1997.

Background

In her complaint and response to defendants' motion for summary judgment, plaintiff alleges that plaintiff's decedent, Leith Maiden, was a resident patient at defendant Southgate Regional Center. On June 9, 1994, a fellow resident began to tease and harass plaintiff's decedent. The two residents began to shout and plaintiff's decedent knocked over some chairs. Defendant Center's employees, the individual defendants, began to physically restrain plaintiff's decedent. The defendants applied a two-man "take-down" of plaintiff's decedent, holding his neck and shoulders to the floor. The defendants then held plaintiff's decedent's face down on the floor, grasping the back of his neck. As a result, plaintiff's decedent was asphyxiated and suffocated.

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[1] The motion includes all the defendants except for defendant Troy, who has not requested legal representation from the Michigan Attorney General.

[2] Defendants Southgate regional Center and Michigan Department of Health have also filed a motion to dismiss based on Eleventh Amendment immunity for state agencies. Because the Court can fully dispose of plaintiff's claims on defendants' more inclusive motion for summary judgment, it will not address the motion to dismiss.

On January 24, 1996, plaintiff brought a wrongful death suit against the defendants in Wayne County Circuit Court. In that action, plaintiff alleged that defendants caused decedent's asphyxiation and death by compressing his airway while physically restraining him. On October 30, 1996 defendants filed a motion for summary disposition asserting that there were no genuine issues of material fact and that they were entitled to judgment as a matter of law. On December 20, 1996, after reviewing written briefs and hearing oral argument, the circuit court judge granted defendants' motion for summary disposition and dismissed plaintiff's complaint with prejudice.

On January 13, 1997, plaintiff sought to amend her state complaint to add a federal claim pursuant to 42 U.S.C. § 1983. Plaintiff's motion to amend was denied and plaintiff filed this suit now before the Court. Plaintiff contends that defendants' actions, "under the color of state law, did deliberately and intentionally, with callous and reckless indifference to the plaintiff's decedent's well-being, cause his death." (Pl.'s Resp. To Defs.' Mot. For Summ.J.)

In the motion now before the court, defendants argue that plaintiff's suit in this Court is barred under the doctrine of res judicata because the claim is factually identical to plaintiff's state court action. Plaintiff argues that the underlying facts and law asserted in the § 1983 case before this Court are separate and distinct from those presented in the state cause of action and that the doctrine of res judicata does not apply.

Discussion

A determination of the res judicata effect of a state court order on a federal court begins with the Full Faith and Credit Statute, which requires federal courts to give full faith and credit to the judicial proceedings of the state courts. 28 U.S.C. § 1738; *In re Calvert*, 105 F.3d 315 (6th Cir. 1997). In the context of claim preclusion, " 'this statute directs a federal court to refer to the preclusion law of the State in which judgment was rendered.' " *Id.* at 2 (quoting *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380, 105 S.Ct. 1327, 84 L.Ed.2d 274 (1985)).

Under Michigan law, "res judicata bars a subsequent action between the same parties when the evidence or essential facts are identical." *Eaton Road Comm'rs v. Schultz*, 205 Mich App 371, 375 (1994).

> Michigan has adopted the "broad" application of res judicata, which bars claims arising out of the same transaction that plaintiff could have brought but did not, as well as those questions that were actually litigated. The doctrine of res judicata applies equally to facts and law. (Citation omitted). The test for determining whether two claims arise out of the same transaction and are identical for res judicata purposes is whether the same facts or evidence are essential to the maintenance of the two actions.

Jones v. State Farm Mutual Automobile Ins. Co., 202 Mich App 393, 401 (1993).

The plaintiff's § 1983 claim rests upon the same operative facts as her prior state court claim. Both suits seek to recover from defendants for the same conduct, the

physical restraint of Leith Maiden, which allegedly resulted in his death. The only difference between the two suits is the theory of recovery asserted by plaintiff.

Plaintiff argues that the evidence necessary to prove gross negligence in the state court action is not the same as the evidence necessary to prove that defendants intentionally deprived plaintiff's decedent of his constitutional rights, as protected by the 14th Amendment and § 1983. The court disagrees with plaintiff's assertion. Under § 1983, a plaintiff must prove a government official acted with deliberate indifference or recklessness before compensation is appropriate; mere negligence does not engender liability. *See Davidson v. Cannon*, 474 U.S. 344, 347-48, 106 S.Ct. 668, 670 (1986). Under the state law cause of action, to survive the government immunity defense, plaintiff must prove that defendants acted with gross negligence, which is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." M.C.L.A. § 691.1407(2)(c). Thus, for both the state and federal causes of action plaintiff would need to present evidence of defendants' recklessness.

Finally plaintiff's argue that their claim must be heard by this Court because the state court refused to allow her to amend her complaint and thus plaintiff was precluded from asserting her § 1983 claim as part of her state wrongful death claim. This argument is without merit. Plaintiff sought to amend her complaint only after the circuit court judge granted defendants' motion for summary disposition and dismissed her complaint with prejudice. Plaintiff was fully able to assert her claim under § 1983 when she brought her state court action;

and she could have sought leave to amend her complaint prior to the circuit court order dismissing her compliant.[3]

In *Longstreth v. Franklin County Children's Services*, the Sixth Circuit, in an unpublished decision dealing with virtually the identical situation before this Court stated:

> therefore, because plaintiffs' prior state action and subsequent § 1983 action involves the same necessary facts and standards of proof and because plaintiffs' § 1983 claim could have been brought in state court along with their state tort claim, the district court did not err in concluding that res judicata barred plaintiff's § 1983 action.

Longstreth v. Franklin County Children Services, et al., 1993 WL 533484 (6th Cir. Dec. 21, 1993).

The Court is satisfied that plaintiff's state and federal claim stem from the same operative facts and require the same evidence for proof. Thus, plaintiff's federal claim is barred by res judicata.

For the reasons set forth above,

IT IS ORDERED that defendants' motion for summary judgment is **GRANTED.**

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[3] Michigan Court Rules of 1985 (MCR) 2.118(A)(2) provides in relevant part, "Leave [to amend] shall be freely given when justice so requires." Plaintiff does not claim she sought leave to amend prior to the court order dismissing the case on December 20, 1996. Plaintiff's counsel acknowledged at the hearing on April 10, 1997, that leave to amend was not sought prior to December 20, 1996, the date on which the circuit court entered the order granting defendants' motion for summary disposition. In fact, the motion to amend was not filed until January 13, 1997.

IT IS FURTHER ORDERED that plaintiff's complaint against all the defendants except defendant Troy is **DISMISSED.**

PATRICK J. DUGGAN
PATRICK J. DUGGAN
UNITED STATES
DISTRICT JUDGE

Pursuant to Rule 77(d), Fed.R.Civ.P.,
Copies mailed this date to the
following parties:

Rebecca S. Eaton, Esq. Geoffrey N. Fieger, Esq.
Alan F. Hoffman, Esq.

Michigan Supreme Court
Lansing, Michigan 48905

Chief Justice
Elizabeth A. Weaver

[Justices Omitted In Printing]

Opinion

FILED JULY 30, 1999

SADIE MAIDEN, as Personal Representative of the Estate of LEITH MAIDEN, Deceased,

Plaintiff-Appellee,

v No. 110035

HENRY JAMES ROZWOOD, BETTY JO SZABO, PAUL LEONARD TROY, and KARL DOUGLAS MYLES,

Defendants-Appellants,

and

SOUTHGATE REGIONAL CENTER and THE MICHIGAN DEPARTMENT OF HEALTH,

Defendants.

KENNETH RENO,

Plaintiff-Appellant,

v No. 107936

YUNG A. CHUNG, M.D.,

Defendant-Appellee,

and

DONALD PORTICE, MARK TONGE,
LARRY RUSHING AND DAVID JOHNSON,

Defendants.

BEFORE THE ENTIRE BENCH

CORRIGAN, J.

In these consolidated cases, we granted leave to decide the quantum of proof required to survive a motion for summary disposition in gross negligence actions involving government employees under MCL 691.1407(2)(c); MSA 3.996(107)(2)(c). In *Maiden v Radwood*,[1] unpublished order of the Court of Appeals, entered June 26, 1997 (Docket No. 200635), we hold that plaintiff has failed to present evidence of gross negligence sufficient to overcome the immunity conferred by statute. Therefore, we reverse the decision of the Court of Appeals and reinstate the trial court's order. In *Reno v Chung*, although plaintiff presented a material question of fact regarding defendant Chung's gross negligence, we hold that plaintiff's claim fails as a matter of law because defendant owed no duty to plaintiff. We therefore affirm the decision of the Court of Appeals, 220 Mich App 102; 559 NW2d 308 (1996).

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[1] Throughout the lower court proceedings, Henry James Rozwood is erroneously referred to as Radwood.

I. Underlying Facts and Procedural History

A. *Maiden v Rozwood*

Plaintiff's decedent, Leith Maiden, was a resident at the Southgate Regional Center, a state mental health facility. He had been diagnosed as a paranoid schizophrenic with adjustment disorder and disturbances of conduct and mood. On June 9, 1994, Maiden, who was 5'6" tall and weighed 240 pounds, became physically and verbally abusive toward another resident, striking the other resident twice. Paul Troy, a resident care aide, then escorted Maiden back to his assigned residence in another building.

En route to the residence, Maiden announced that he was not returning to the residence and began "wandering off." Troy enlisted the help of defendants Betty Jo Szabo, a licensed practical nurse, and Henry Rozwood, another resident care aide, to escort Maiden to his room. When Maiden entered the building, he ran to the dining room where he immediately caused another disturbance. He yelled, swore, and knocked over furniture in the proximity of other residents. Other staff and residents present in the dining room scurried away from the flying tables and chairs. Defendants Troy, Szabo, and Rozwood attempted to calm Maiden verbally without success.

Maiden struck defendant Troy in the head, knocking him to the floor. Troy lost his glasses and was momentarily dazed. Maiden also attempted to strike Rozwood, and during the struggle they both fell to the floor. Rozwood then sat on Maiden's buttocks in an effort to restrain him, but he was bucked off to Maiden's left side. Rozwood then leaned on Maiden's left shoulder and held

his left arm as he lay face down on the floor. After Maiden thrashed about and attempted to bite defendant Szabo, Rozwood held the back of Maiden's head to prevent him from biting anyone. Troy held Maiden's left arm. Defendant Karl Myles, a fire and safety officer who also had been called to assist, straddled Maiden's legs and told him to calm down.

Maiden was asked if he was all right, to which he replied "yeah." Maiden was then asked if he had settled down, to which he replied "uh-huh." Myles told Maiden to place his hands behind his back and calm down. Maiden placed his arms against his body after the staff released him. Maiden suddenly went limp and stopped breathing. Szabo and Rozwood immediately initiated resuscitation efforts. An ambulance was called, and resuscitation efforts continued until Maiden reached the hospital, where he was pronounced dead.

Defendants Rozwood and Szabo estimated that the entire incident lasted two to three minutes, while another staff member estimated that Maiden was held down five to ten minutes. The medical examiner opined that Maiden's death was caused by "positional and/or compression asphyxia" and the "manner of death was an accident."

Plaintiff filed a wrongful death suit, naming as defendants the regional mental health facility, the Michigan Department of Community Health, and the four employees who participated in the attempt to restrain Maiden. The circuit court dismissed the complaint against the mental heath facility and the Department of Community Health on the basis of government immunity. MCL

691.1407(1); MSA 3.996(107)(1). No issues involving these defendants were raised on appeal.

The complaint alleged that the individual defendants' conduct was grossly negligent within the meaning of the statute and thus not immune from liability. MCL 691.1407(2) (c); MSA 3.996(107) (2) (c).

Defendants moved for summary disposition under MCR 2.116(C) (10). The trial court granted the motion, concluding that nothing in the record showed that defendants' actions "rose to the level of gross negligence as defined by the law. . . . " The Court of Appeals thereafter granted plaintiff's motion for peremptory reversal, vacated the order granting summary disposition, and remanded for further proceedings, holding that genuine issues of material fact existed. We granted leave to appeal. 458 Mich 874 (1998).

B. *Reno v Chung*

On May 10, 1991, plaintiff arrived home and discovered that his wife, Carlynne, and daughter, Robin, had been brutally stabbed. Plaintiff's wife was already dead, but Robin was still alive. Her throat had been cut. She identified an acquaintance named Tommy Collins as their assailant just before she died. Plaintiff subsequently related his daughter's dying words to the police.

Both Collins and plaintiff were suspects in the double murder. The police investigation quickly focused on plaintiff after defendant, a Wayne County assistant medical examiner, performed autopsies on the decedents and opined that the stab wounds to Robin's neck made her

unable to speak. On the basis of this information, plaintiff was arrested and charged with murder. He was bound over after a preliminary examination at which defendant testified that plaintiff's daughter could not possibly have implicated Tommy Collins, given the nature of the injuries to her throat.

In preparation for plaintiff's murder trial, the prosecutor consulted a pathologist, Dr. Laurence Simson, M.D., the Ingham County Medical Examiner, and an otolaryngologist, Dr. Robert Mathog, Chairman of Otolaryngology at Wayne State University, to corroborate defendant's opinion. Defendant thereafter refused to turn over records and specimens to the prosecutor for the experts' review, requiring that the prosecution obtain a court order to compel her compliance.

Rather than corroborate defendant's conclusions, both experts stated that defendant's findings and conclusions were completely wrong. Both experts found that defendant's conclusions regarding the victim's ability to speak had no anatomical or physiological basis. Both experts unequivocally opined that the victim's neck injuries would not have prevented her from speaking.

Because defendant's conclusions had been discredited, the prosecutor dismissed the charges against plaintiff.[2] Ten months later, plaintiff sued defendant and other parties, alleging that defendant had been grossly negligent. Defendant moved for summary disposition

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[2] Tommy Collins thereafter confessed to the crime. He and a coconspirator were later convicted and sentenced for the double murders.

under MCR 2.116(C) (7), (8) and (10), claiming that she owed no duty to plaintiff, that her conduct was not grossly negligent and that she was entitled to witness immunity. The trial court granted the motion under both MCR 2.116(C) (8) and (10), finding for defendant on all issues.

Plaintiff appealed. In a divided opinion, the Court of Appeals affirmed the order granting summary disposition. The majority found that defendant owed no duty to plaintiff under the public duty doctrine and that no special relationship existed between plaintiff and defendant. The dissenting judge found that defendant owed a duty to plaintiff and that plaintiff had presented a material question of fact regarding defendant's gross negligence. We granted leave to appeal, limited to (1) whether the Court of Appeals erred in holding that the defendant had no special relationship and owed no duty to the plaintiff, and (2) whether the trial court clearly erred in holding that the plaintiff had failed to present a material fact question regarding defendant's gross negligence under MCL 691.1407(2) (c); MSA 3.996(107) (2) (c). 457 Mich 863 (1998).

II. Governing Legal Standards

This Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law. In making this determination, the Court reviews the entire record to determine whether defendant was entitled to summary disposition. *Groncki v Detroit Edison*, 453 Mich 644, 649; 557 NW2d 289 (1996) (opinion of Brickley, C.J.).

In *Maiden*, the trial court granted summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact). In *Reno*, the trial court granted summary disposition on the basis of both MCR 2.116(C)(8) (failure to state a claim upon which relief can be granted) and MCR 2.116(C)(10). MCR 2.116(C)(7) permits summary disposition where the claim is barred by immunity.[3] The appropriate grounds for granting summary disposition in *Reno* are MCR 2.116(C)(7), (8).

A. Legal Standard Under MCR 2.116(C)(7)

A party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence. If such material is submitted, it must be considered. MCR 2.116(G) (5). Moreover, the substance or content of the supporting proofs must be admissible in evidence. See part III. Unlike a motion under subsection (C)(10), a movant under MCR 2.116(C)(7) is not required to file supportive material, and the opposing party need not reply with supportive material. The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant. *Patterson v Kleiman*, 447 Mich 429, 434, n 6; 526 NW2d 879 (1994).

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[3] MCR 2.116(C)(7) permits summary disposition where "[t]he claim is barred because of release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action."

B. Legal Standard Under MCR 2.116(C) (8)

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Wade v Dep't of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992). A motion under MCR 2.116(C) (8) may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id.* at 163. When deciding a motion brought under this section, a court considers only the pleadings. MCR 2.116(G) (5).

C. Legal Standard under MCR 2.116(C) (10)

A motion under MCR 2.116(C) (10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4). *Quinto v Cross & Peters Co.*, 451 Mich 358; 547 NW2d 314 (1996).

The plaintiff relies on *Rizzo v Kretschmer*, 389 Mich 363; 207 NW2d 316 (1973), for the proposition that a motion for summary disposition under MCR 2.116(C)(10) is properly granted where it is impossible for the claim to be supported by evidence at trial. In fact, the 1985 amendment of the court rules superseded the standard

described in *Rizzo. McCart v J Walter Thompson USA, Inc.*, 437 Mich 109, 115, n 4, 469 NW2d 284 (1991).

MCR 2.116(G)(4) requires:

> A motion under subrule (C)(10) must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact. When a motion under subrule (C)(10) is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her.

A litigant's mere pledge to establish an issue of fact at trial cannot survive summary disposition under MCR 2.116(C)(10). The court rule plainly requires the adverse party to set forth specific facts at the time of the motion showing a genuine issue for trial.

Today we clarify the correct legal standard under MCR 2.116(C)(10) because our Court has inconsistently applied the standard since the 1985 amendment of the court rules. Compare *Johnson v Detroit*, 457 Mich 695, 579 NW2d 895 (1998); *Oakland Co Bd of Co Rd Comm'rs v Mich Property & Casualty Guaranty Ass'n*, 456 Mich 590; 575 NW2d 751 (1998); *Landelius v Sackellares*, 453 Mich 470; 556 NW2d 472 (1996); *Quinto v Cross & Peters Co, supra*, with *Lytle v Malady (On Rehearing)*, 458 Mich 153; 579 NW2d 906 (1998); *Weymers v Khera*, 454 Mich 639; 563 NW2d 647 (1997); *Radtke v Everett*, 442 Mich 368; 501

NW2d 155 (1993); *Farm Bureau Mut Ins Co. of Michigan v Stark*, 437 Mich 175; 468 NW2d 498 (1991). The reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion. A reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial. A mere promise is insufficient under our court rules.

III. Gross Negligence

Generally, government officers and employees acting within the scope of their authority are immune from tort liability, provided that their actions are not grossly negligent. The plain language of the governmental immunity statute indicates that the Legislature limited employee liability to situations where the contested conduct was substantially more than negligent. Gross negligence is defined by statute as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(2)(c); MSA 3.996(107)(2)(c). With this statutory definition in mind, we consider the proof sufficient to survive summary disposition of a gross negligence claim against a government employee.

In *Jackson v Saginaw Co*, 458 Mich 141; 580 NW2d 870 (1998), the plaintiff sued the Saginaw County jail physician, claiming that the doctor was grossly negligent in failing to diagnose the plaintiff's throat cancer. This Court upheld the order granting summary disposition for the defendant county. Agreeing with the trial court that reasonable minds could not differ in concluding that the

defendant's conduct was not grossly negligent, this Court stated:

> As we have noted, it appears that the deposition testimony offered to the trial court fails to raise a question whether the defendant even violated the standard of care applicable to him and therefore would be guilty of negligence. There is, however, clearly no testimony at all offered to support a notion that his conduct would be so reckless as to demonstrate a substantial lack of concern for whether an injury results. [*Id.* at 150-151.]

The logical import of *Jackson*, consistent with the statutory definition of gross negligence, is that evidence of ordinary negligence does not create a material question of fact concerning gross negligence.[4] Rather, a plaintiff must adduce proof of conduct "so reckless as to demonstrate a substantial lack of concern for whether an injury results." To hold otherwise would create a jury question premised on something less than the statutory standard.

In addition to requiring that a plaintiff show reckless conduct, the content or substance of the evidence proffered must be admissible in evidence. In *Lytle v Malady, supra*, this Court clarified the evidentiary standard required to survive summary disposition in age and gender discrimination claims. The *Lytle* Court stated:

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[4] See also *Harris v Univ of Michigan Bd of Regents*, 219 Mich App 679, 694; 558 NW2d 225 (1996); *Vermilya v Dunham*, 195 Mich App 79, 83; 489 NW2d 496 (1992).

> [W]e find that, in the context of summary disposition, a plaintiff must prove discrimination with *admissible evidence*, either direct or circumstantial, sufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor for the adverse action taken by the employer toward the plaintiff. [*Id.* at 176 (emphasis added).]

No principle requires a higher evidentiary standard to support a material question of fact for age and gender discrimination claims and a lower standard in support of gross negligence claims. Therefore, only evidence whose content or substance is admissible can establish the existence of gross negligence as statutorily defined.[5] See also *Pauley v Hall*, 124 Mich App 255; 335 NW2d 197 (1983); *SSC Associates Ltd Partnership v General Retirement System of Detroit*, 192 Mich App 360; 480 NW2d 275 (1991). This requirement is consistent with the predecessor rule, GCR 1963, 117.3, and the plurality opinion in *Durant v Stahlin*, 375 Mich 628, 638-639, 657; 135 NW2d 392 (1965), as well as the federal evidentiary standard for summary judgment under FR Civ ¶ 56(e).[6]

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[5] Demanding that evidence be substantively admissible is consistent with MCR 2.116(G)(4), which requires that an adverse party "set forth specific facts showing that there is a genuine issue for trial." By presenting inadmissible hearsay evidence, a nonmoving party is actually promising to create an issue for trial where the promise is incapable of being fulfilled. The nonmovant is not *showing* that a genuine issue exists. Permitting inadmissible evidence to suffice in opposing summary disposition would require less than the pre-1985 court rule and create illusory fact issues.

[6] Under FR Civ ¶ 56, a plaintiff is required "to present evidence of evidentiary quality – either admissible documents

A. *Maiden v Rozwood*

In opposing defendant's motion for summary disposition, plaintiff presented excerpts of the deposition of witnesses, portions of a Michigan State Police Supplemental Report dated June 23, 1994, portions of an incident report prepared by the employees, and the medical examiner's report.

The excerpts of the supplemental police report are inadmissible hearsay when offered against codefendants Troy and Rozwood.[7] The police report itself is plausibly admissible under the business record exception, MRE 803(6). The statement in the police report attributed to defendant Myles, describing the actions of defendants Troy and Rozwood, is hearsay. When the document to be admitted contains a second level of hearsay, it also must qualify under an exception to the hearsay rule. *Merrow v Bofferding*, 458 Mich 617; 581 NW2d 696 (1998). Because Myles' statement to the police describing the actions of

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or attested testimony, such as that found in depositions or in affidavits – demonstrating the existence of a genuine issue of material fact. The evidence need not be in admissible form: affidavits are ordinarily not admissible evidence at a trial. But it must be admissible in content. . . . Occasional statements in cases that the party opposing summary judgment must present admissible evidence . . . should be understood in this light, as referring to the content or substance, rather than the form, of the submission." *Winskunas v Birnbaum*, 23 F3d 1264, 1267-1268 (CA 7, 1994) (internal citations omitted).

[7] The supplemental police report indicates that "Mr. Myles states that Paul Troy was lying across Leith's back and Henry Rozwood was lying across Leith's upper back and shoulder area."

the codefendants does not fall within any of the enumerated hearsay exceptions, the police report is inadmissible and may not be considered in opposing the motion for summary disposition.[8]

The information contained in the remaining documents, viewed in a light most favorable to the plaintiff, reveals that a staff member may have lain across the decedent's upper body using an unapproved restraint technique, a staff member momentarily held the back of decedent's head to prevent biting, and that the incident

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[8] The dissent essentially concedes that Myles' statement in the police report is inadmissible against defendants Rozwood and Troy. Slip op. at 832. This is properly so, for the evidence is rank hearsay, not appropriately considered in deciding whether plaintiff has met his burden in establishing gross negligence against Rozwood and Troy. A party admission under MRE 801(d)(2)(A) is "simply words or actions inconsistent with the party's position at trial, relevant to the substantive issues in the case, and offered against the party." 2 McCormick, Evidence (4th ed.), § 254, p. 142. The evidentiary rule requires that the statement: (1) be offered against a party and: (2) be the party's own statement, either in an individual or representative capacity.

While Myles' statement that his coworkers laid across Maiden's back is plausibly admissible against Myles himself, the statement does not establish or advance a genuine issue of material fact regarding his own gross negligence. In any event, the statement was not offered to establish Myles' gross negligence, but the gross negligence of Myles' coworkers. While the statement may be used to impeach Myles under MRE 613(b), it may not be offered for the truth of the matter asserted to create a genuine issue of material fact regarding the codefendants.

may have lasted as long as five to ten minutes.[9] The uncontroverted evidence establishes that the decedent

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[9] Plaintiff also submitted excerpts from a supplemental police report, indicating that a police officer observed discoloration on the decedent's neck. The officer observed decedent's neck at the funeral home five days after his death, well after the body had been embalmed. The medical examiner's report contains no indication of any significant abnormality about the neck. Further, no evidence suggests that the discoloration resulted from any employee's restraint efforts. Considering that physicians performed advanced life support for approximately thirty minutes and the body was embalmed in the time between the incident and the police officer's observations, an inference that the discoloration directly resulted from the restraint is speculative at best.

Both the dissent and plaintiff's brief cite Harrison, Principles of Internal Medicine (12th ed.), and its discussion of Anoxic-Ischemic Encephalopathy to further the claim that a fact question exists regarding whether defendants' actions were grossly negligent.

This evidence was not properly before the court. Plaintiff offered the textbook passages for the first time in support of its motion for rehearing. In ruling on a motion for summary disposition, a court considers the evidence then available to it. Accordingly, in ruling on the propriety of the trial court's grant of defendant's motion for summary disposition, we do not consider the textbook evidence. *Quinto v Cross & Peters Co, supra* at 366. See also *Grand Rapids v Harper*, 25 Mich App 447, 449; 181 NW2d 581 (1970) ("In reviewing the granting of summary judgment, we are governed only by what was then before the trial court – the complaint, answer, depositions and affidavits – and not by what the [nonmovant] raises" on appeal for the first time).

The dissent contends that the textbook evidence was properly before the trial court because the motion for rehearing was submitted after the summary disposition motion was argued, but before the trial court issued its written order. This

was out of control during his outburst and posed a serious danger to himself and others. The staff attempted verbal redirection without success. Maiden struck another patient twice, threw furniture in a confined area with other residents present, hit staff members, and attempted to bite them. The imminent danger posed by decedent's volatile behavior required that the staff exercise split-second judgment in deciding how and when to use physical intervention. While they might have used other means to restrain Maiden, reasonable minds could not agree that the failure to employ those alternatives was so reckless "as to demonstrate a substantial lack of concern for whether an injury results."

Plaintiff essentially argues that because Maiden died of compressional asphyxia after being restrained, gross negligence is presumed. Plaintiff thus employs the doctrine of res ipsa loquitur to establish the existence of gross negligence.[10] "The major purpose of the doctrine of

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argument implicitly demands that the trial court treat plaintiff's motion for rehearing as a motion to amend the original pleadings. We decline to impose such a requirement, conspicuously absent in the court rules, where proper amendment to the pleadings was possible under MCR 2.118(A)(2).

[10] The dissent raises a similar argument, stating that a jury could reasonably conclude that the cause of death supported the assertion that "defendants suffocated Mr. Maiden in a manner that evidenced a substantial lack of concern for whether they injured him." Slip op at 7 The dissent's argument is essentially a classic case of the tail wagging the dog. To establish gross negligence as statutorily defined, the plaintiff must focus on the actions of the governmental employee, not on the result of those actions. That death resulted from the restraint does not support

res ipsa loquitur is to create at least an inference of negligence when the plaintiff is unable to prove the actual occurrence of a negligent act." *Jones v Porretta*, 428 Mich 132, 150; 405 NW2d 863 (1987). While the doctrine of res ipsa loquitur may assist in establishing ordinary negligence, the doctrine is not available where the requisite standard of conduct is gross negligence or wilful and wanton misconduct. See *Prosser & Keeton*, Torts (5th ed), § 39, p 255; 23 ALR3d 1083, § 2, pp. 1085-1086; 2 Restatement Torts, 2d, § 328D, comment on clause (c) of subsection (1), pp. 163-164; *Burghardt v Olson*, 223 Or 155; 354 P2d 871 (1960); *Laster v Tatum*, 206 Va 804; 146 SE2d 231 (1966).

Plaintiff's proofs in opposition to defendants' motion for summary disposition fail to raise a material question that defendant employees' conduct was so reckless as to demonstrate a substantial lack of concern for whether an injury results. Plaintiff failed to meet her burden to come forward with specific facts to support her claim that defendants' conduct was grossly negligent. On the basis of the record before us, reasonable minds could not differ. Accordingly, the trial court properly granted summary disposition for defendants.

B. *Reno v Chung*

Plaintiff submitted affidavits from otolaryngologist Robert Mathog, M.D., and pathologist Laurence Simson,

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the conclusion that defendant's actions were so reckless "as to demonstrate a substantial lack of concern for whether an injury results."

M.D., the Ingham County Medical Examiner, the experts whom the prosecutor had consulted to prepare for plaintiff's criminal trial, in opposition to defendant's motion for summary disposition.

Dr. Simson's affidavit stated in part:

> Dr. Chung's testimony that Robin Reno could not have spoken to Kenneth Reno before she died is incorrect. The basis for her testimony . . . is erroneous and is not consistent with the laryngeal injuries recorded by Dr. Chung. There is no anatomic or physiologic basis for her assertion that Robin Reno would have been unable to speak. . . . Dr. Chung's assertion . . . reflect[s] a misunderstanding on the nature of Robin Reno's laryngeal injuries and/or the mechanisms of laryngeal function in the generation of speech. Since Robin Reno's ability or inability to speak was such an important issue in the case . . . , it would have been prudent for the medical examiner to have sought consultation if she did not have confidence in her own ability to interpret such laryngeal injuries.

Dr. Mathog's affidavit provided:

> Dr. Chung's understanding of the anatomy and physiology of the larynx is flawed and full of misconceptions.
>
> Dr. Chung's testimony that Robin Reno could not have spoken to Kenneth Reno before she died is absolutely wrong.
>
> Her alleged basis for that statement as contained in her testimony . . . is erroneous and has no medical basis.

> There is no physiological basis for her assertions. She is anatomically incorrect. She has failed to make a proper examination or gain essential knowledge of the physiology of that area of the body to make findings or testify in regard to same.
>
> Dr. Chung's failure to properly perform the autopsy with the requisite knowledge of the anatomy, physiology and function of the effected area and then testifying to the impossibility of speech based on erroneous assertions regarding the nature of the wounds and their effect on the deceased constituted a breach of her duty to perform her duties as a medical examiner as a reasonably prudent medical examiner would have, and was gross negligence defined as conduct so reckless as to demonstrate a substantial lack of concern for whether an injury was likely to result, resulting in the imprisonment of Mr. Reno based on her testimony.
>
> Defendant Chung failed to possess the requisite knowledge and skill to testify as to the effect of the wounds in the throat area. A reasonably prudent medical examiner would not have testified as she did nor made the baseless findings that she did.

The affidavits of both these expert witnesses reveal more than a mere difference of medical opinion. Rather, both emphatically indicate that defendant had no medical basis for her findings and conclusions. Both expert witnesses essentially opine that defendant's medical findings and testimony were incompetent.[11]

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[11] Dr. Mathog averred that defendant's performance was grossly negligent as defined by statute. However, the witness did not create a question of fact by merely opining that

We also note defendant's refusal to cooperate with the prosecutor after he consulted the other expert witnesses. Defendant made her records and specimens available to the prosecutor for the experts' review only after a court order compelled her to do so. A reasonable inference can be drawn that defendant refused to comply because she knew her opinion was fallacious and that her incompetency would be revealed.

Defendant's erroneous conclusion regarding the victim's ability to speak before she died was the key factor leading to plaintiff's arrest. The assistant prosecutor testified in his deposition that defendant's medical opinion was "the most important part of my decision-making process." On these facts, plaintiff's proofs in opposition to the motion for summary disposition thus raised a material question of fact regarding the statutory standard for gross negligence.

IV. Duty (*Reno v Chung*)

The Court of Appeals in this case extended the public duty doctrine of *White v Beasley*, 453 Mich 308; 552 NW2d 1 (1996), to hold that defendant medical examiner owed no duty to and had no special relationship with plaintiff. Because the Legislature has implicitly delineated the

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defendant's performance violated the statutory standard. Whether the statutory standard of care was violated is a legal conclusion. The opinion of an expert does not extend to legal conclusions. *Downie v Kent Products*, 420 Mich 197, 205; 362 NW2d 605 (1984). The facts in the expert witnesses' affidavits properly created a question of fact.

nature and scope of defendant's duties relative to criminal defendants, we need not determine whether an individual duty exists under the common law or whether the public duty doctrine of *White v Beasley* should be extended to the facts of this case.[12]

The question presented is whether defendant medical examiner owed a duty to plaintiff, a person under investigation for murder, as a consequence of performing an autopsy to ascertain the victim's cause of death and testifying as a state's witness against plaintiff.[13] Whether a duty exists to protect a person from a reasonably foreseeable harm is a question of law for the court. *Murdock v Higgins*, 454 Mich 46, 53; 559 NW2d 639 (1997); *Trager v Thor*, 445 Mich 95, 105; 516 NW2d 69 (1994). "A negligence action may only be maintained if a legal duty exists which requires the defendant to conform to a particular

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[12] We do not mean to suggest that the statute, *infra*, delineates the scope of the medical examiner's duty in all cases. There may well be instances of misconduct on the part of a medical examiner that are not implicated by the statute. However, such a case is not before us today, and we need not speculate on facts not presented.

[13] The dissent relies on *Lauer v New York City*, 171 Misc 2d 832; 656 NY2d 93 (1997), to support the conclusion that a duty should be imposed on defendant. *Lauer* was modified by the New York Supreme Court, Appellate Division, in *Lauer v City of New York*, 1999 WL 448894. There, the court differentiated the duty of the medical examiner in performing the autopsy from the duty to correct the cause of death on medical records. The appellate court held that the medical examiner had immunity in the performance of the autopsy because "in issuing that diagnosis Dr. Lilavois was exercising his judgment as a Medical Examiner for the benefit of the general public only, and so was shielded by sovereign immunity."

standard of conduct in order to protect others against unreasonable risks of harm." *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992).

In determining whether the relationship between the parties is sufficient to establish a duty, the proper inquiry is " 'whether the defendant is under any obligation for the benefit of the particular plaintiff. . . . ' " *Buczkowski v McKay*, 441 Mich 96, 100; 490 NW2d 330 (1992), quoting *Friedman v Dozorc*, 412 Mich 1, 22; 312 NW2d 585 (1981). This analysis concerns whether the relationship of the parties is of a sort that a legal obligation should be imposed on one for the benefit of another. *Id.*

We need not apply the usual Buczkowski common-law analysis, since statutory law provides that defendant owed no legal duty to plaintiff.

A. A Medical Examiner's Statutory Obligations

The statutory powers and duties of a county medical examiner are found at M.C.L. 52.201 *et seq.*; MSA 5.953(1) *et seq.* Under our statutory scheme, a county medical examiner must investigate the cause of death in all cases of persons who meet a violent death. MCL 52.202; MSA 5.953(2). Further, a medical examiner "may be required to testify *in behalf of the state* in any matter arising as the result of any investigation required under this act, and *shall testify in behalf of the state*. . . . " MCL 52.212; MSA 5.953(12) (emphasis added). Accordingly, our Legislature has defined a medical examiner's duties. Nothing in the

statutory scheme has created duties to a criminal defendant; instead, the duty is owed to the state.[14] Defendant thus communicated her medical findings to the prosecutor in fulfilling her statutory duty to investigate cases of violent death and to testify as a state's witness regarding the results of her investigation. While an injury to a wrongly accused criminal defendant from erroneous findings is foreseeable, the express language of the statute requiring medical examiners to testify on behalf of the state militates against imposing any duty on defendant Chung to plaintiff as a consequence of her incompetent medical findings and testimony.[15]

B. Witness Immunity

Defendant Chung consulted with the prosecutor and later testified against plaintiff as the state's factual and

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[14] We disagree that we are essentially granting "absolute immunity to any government employee who has statutorily enumerated duties." Slip op. p 834. The statute applies only to medical examiners, and the scope of the statutory duty imposed on the medical examiner to the state is completely incompatible with a duty to a criminal defendant. As noted *supra*, n 12, we do not suggest that the statute grants absolute immunity in every case. The specific facts of *this* case militate against imposing a duty on defendant medical examiner for the benefit of plaintiff.

[15] The dissent fails "to see the difference" between finding no duty to plaintiff under the statute and finding no duty under the public duty doctrine. Slip op p 10. We reject the dissent's claim that we have merely adopted the public duty doctrine, a creature of the common law, in another guise. The dissent essentially ignores the explicit legislative directive compelling a medical examiner to investigate the cause of death and to testify as a witness on behalf of the state. The dissent substitutes its own policy choice for that of the Legislature in finding the duty is owed to a criminal defendant.

expert witness at plaintiff's preliminary examination. As such, her role was plainly adversarial to plaintiff's interests. In *Friedman v Dozorc, supra,* this Court declined to impose a duty on an attorney to his client's adversary, stating that to do so would be "inconsistent with basic precepts of the adversary system." *Id.* at 23. Moreover, the duty imposed on a witness is generally owed to the court, not the adverse party. Accordingly, a breach of the duty owed to the court does not give rise to a cause of action in tort by the adverse party.[16]

Further, witnesses who testify during the course of judicial proceedings enjoy quasi-judicial immunity. This immunity is available to those serving in a quasi-judicial adjudicative capacity as well as "those persons other than judges without whom the judicial process could not function." 14 West Group's Michigan Practice, Torts, § 9:393, p. 9-131. Witnesses who are an integral part of the judicial process "are wholly immune from liability for the consequences of their testimony or related evaluations." *Id.*, § 9:394, pp 9-131 to 9-132, citing *Martin v Children's Aid Society,* 215 Mich App 88, 96; 544 NW2d 651 (1996). Statements made during the course of judicial proceedings are absolutely privileged, provided they are relevant, material, or pertinent to the issue being tried. See *Martin v Children's Aid Society, supra; Rouch v Enquirer & News,* 427 Mich 157, 164; 398 NW2d 245 (1986); *Meyer v Hubbell,* 117 Mich App 699, 709; 324 NW2d 139 (1982); *Sanders v Leeson Air Conditioning Corp,* 362 Mich 692, 695; 108 NW2d 761

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[16] See *Lewis v Swenson,* 126 Ariz 561, 566; 617 P2d 69 (Ariz App, 1980); *Kahn v Burman,* 673 F Supp 210, 214 (ED Mich, 1987); *OMI Holdings, Inc v Howell,* 260 Kan 305; 918 P2d 1274 (1996).

(1961). Falsity or malice on the part of the witness does not abrogate the privilege. *Sanders, supra*. The privilege should be liberally construed so that participants in judicial proceedings are free to express themselves without fear of retaliation. *Id.* As this Court noted in *Daoud v De Leau*, 455 Mich 181, 202-203; 565 NW2d 639 (1997):

> Witness immunity is also grounded in the need of the judicial system for testimony from witnesses who, taking their oaths, are free of concern that they themselves will be targeted by the loser for further litigation. Absent perjury of a character requiring action by the prosecuting attorney, the testimony of a witness is to be weighed by the factfinder in the matter at bar, not by a subsequent jury summoned to determine whether the first lawsuit was tainted. . . .

We reject as factually inaccurate plaintiff's claim that witness immunity is unavailable here because the "impact" of defendant's opinion "was not initiated and did not occur in any judicial proceeding. . . . " The autopsy, investigating the circumstances surrounding Robin Reno's death, was performed under statutory mandate and was a necessary predicate to defendant's statutorily compelled testimony. Moreover, defendant's testimony at the preliminary examination regarding the autopsy results led to plaintiff's continued detention. Indeed, scrutiny of the deposition testimony of plaintiff's experts reflects that their opinions hinged on her medical findings and her testimony in court. (See excerpts of Mathog and Simson depositions quoted at pp. 21-22, *supra*.) Plaintiff cannot avoid the protection of witness immunity by artful pleading; the gravamen of plaintiff's action is determined by considering the entire claim.

Because defendant owed no legal duty to plaintiff, the gross negligence claim alleged is unenforceable as a matter of law. Summary disposition was properly granted under MCR 2.116(C)(8).

V. Conclusion

In *Maiden v Rozwood,* we reverse the order of the Court of Appeals and affirm the trial court's order granting summary disposition. In *Reno v Chung,* we affirm the decision of the Court of Appeals.

/s/ Maura Corrigan

/s/ Elizabeth P. Weaver

/s/ Clifford Taylor

/s/ Robert P. Young, Jr.

KELLY, J. *(dissenting).*

I respectfully dissent from the majority opinion in both *Maiden v. Rozwood* (Docket No. 110035) and *Reno v. Chung* (Docket No. 107936). In *Maiden,* I would hold that plaintiff has presented sufficient evidence of defendants' gross negligence to survive a motion for summary disposition. In *Reno,* I would hold that defendant owed a duty to plaintiff that supported a cause of action for gross

negligence under the governmental immunity statute. MCL 691.1407(2)(c); MSA 3.996(107)(2)(c).

I. *Maiden v. Rozwood*

A

In finding a lack of gross negligence on the part of defendants in this case, the majority erroneously concludes that the statement by defendant Myles was inadmissible hearsay and, therefore, may not be considered by this Court. In addition, the majority needlessly engages in a discussion concerning evidence admissibility under MCR 2.116(G)(4) and whether our court rule henceforth is to be read as mirroring Federal Rule of Civil Procedure 56(e). This Court has not had the benefit of briefing and oral argument regarding whether federal law interpreting Rule 56(e) should be applied to our Rule 2.116(G)(4). Also, the discussion is unnecessary to answer the question actually presented. Hence, it is irrelevant. See *Mudge v. Macomb Co.*, 458 Mich. 87, 105; 580 N.W.2d 845 (1998); *Mitcham v. Detroit*, 355 Mich. 182, 203; 94 N.W.2d 388 (1959).

B

Reviewing the evidence in the light most favorable to plaintiff in this case, the facts support her assertion that a jury reasonably could find that defendants' actions constituted gross negligence.

The governmental immunity statute defines gross negligence as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results."

MCL 691.1407(2)(c); MSA 3.996(107)(2)(c). Here, the evidence supports plaintiff's assertion that defendants held down Mr. Maiden, compressing his airway in such manner that he was unable to breathe for five to ten minutes. While the majority characterizes this as a classic case of "the tail wagging the dog," Mr. Maiden certainly did not, to paraphrase plaintiff's counsel, simply suffocate from choking on a cherry pit. Sometimes, the result of an action provides a characterization of the action itself.

Contrary to the majority's assertion, plaintiff has provided a significant amount of factual support in the record to establish gross negligence on the part of the defendants. In particular, defendants' supervisor testified at his deposition:

> [T]here are no techniques that I demonstrate whereby an individual is placing their weight on a client's head, neck, chest, back, buttocks, legs. It's not – we do not instruct that.
>
> * * *
>
> [W]hat I train are the techniques which are approved for use, they know that those are the techniques that are approved for use, and use of any other technique may not be considered an approved technique.

He also testified that defendants were not taught any technique that would allow them to put pressure on the head or neck. None of the methods of restraint defendants were taught would result in a person not being able to breathe for an extended period.

There is clear evidence in the record that defendants disregarded their training and used "unapproved"

restraining techniques. For example, in defendant Rozwood's written statement to the Michigan State Police, he indicated that he "sprawled myself across his upper body trying to grab his [right] arm," and "pushed myself more on to Leith's [left] side of back hoping my weight would assist in [at] least restricting his [left] side from twisting." He also admitted putting "both my hands on the back of his head" and holding him down for a few seconds. He gave similar testimony at his deposition:

> I put my arm, I believe on his head, to stabilize his head so he couldn't move his head anymore to lunge, and then I would sit there and continue to talk to him, and that's what went on.
>
> * * *
>
> *Q.* You just indicated to your neck, when you were showing what area you grabbed, were you holding his neck or head?
>
> *A.* The back of his head, right over here.
>
> *Q.* Right at the base of his neck?
>
> *A.* At the base, bottom part of his head.
>
> *Q.* And were you holding it hard enough so he could not move his head?
>
> *A.* For that initial moment, yeah."

Defendant Troy gave similar testimony in his deposition concerning defendant Rozwood's actions:

> *Q.* Was [Rozwood] holding on to his arms or his legs or any other part of his body?
>
> *A.* More than likely – I think he was lying across his – across the side of his back trying to hold his back down onto the floor. . . .

As regards his own actions, defendant Troy testified that he may have lain across the decedent's back at some time:

> *Q.* Did you see anybody laying across Leith's back or neck at any time?
>
> * * *
>
> *A.* I might have been laying across his back. I'm not even sure.

In addition, defendant Myles' statement to the police implicated himself in forcefully subduing Leith Maiden along with Paul Troy and Henry Rozwood. The majority incorrectly states that Myles' statement was not admissible under MRE 801(d)(2)(A). This rule requires that, to be admissible, the proffered statement must be offered against a party and be the party's own statement, either in an individual or in a representative capacity. The majority concludes that Myles' statement to the police is not probative of Myles' own negligence and is thus inadmissible to establish defendants' negligence. This is incorrect.

Myles is a named defendant in this joint tortfeasor action by virtue of his direct involvement in the effort to restrain defendant. The evidence in question is directly probative of Myles' negligence and is his own statement to police. The trial court may be required to give a limiting instruction to the jury regarding its use concerning the negligence of the other individual defendants. However, for purposes of summary disposition, this evidence is clearly admissible under MRE 801(d)(2)(A).

Hence, as the evidence presented illustrates, defendants violated their training procedures for subduing a

patient, knowing the possible consequences of restraining a patient improperly. Those facts constitute significant evidence that they were acting with "a substantial lack of concern for whether an injury results." MCL 691.1407(2)(c); MSA 3.996(107)(2)(c).

As plaintiff noted, Harrison, Principles of Internal Medicine (12th ed.), also supports her assertion that the defendants suffocated Mr. Maiden in a manner that evidenced a substantial lack of concern for whether they injured him. In discussing the subject of Anoxic-Ischemic Encephalopathy,[1] the following language pertains to the instant case:

> This common and often disastrous condition is caused by a lack of oxygen to the brain, resulting from . . . respiratory failure. . . . The conditions that most often lead to anoxic-ischemic encephalopathy are . . . (5) suffocation [from drowning, strangulation . . . compression of the trachea . . .].
>
> With severe hypoxia or anoxia [loss of oxygen] . . . consciousness is lost within seconds, but recovery will be complete if breathing, oxygenation of blood and cardiac action are restored within 3 to 5 min. If anoxia persists beyond this time, there is serious and permanent injury to the brain. . . . [*Id., p. 2050*].[2]

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[1] A condition caused by lack of oxygen to the brain.

[2] The majority maintains that it would be improper to consider the evidence contained in Harrison in support of plaintiff's argument. I am not convinced that a rehearing motion before the trial court should be treated as an appeal when considering the evidence to be weighed in reviewing a

This evidence, combined with the above testimony, indicates a degree of recklessness sufficient to allow a jury to conclude that defendants were grossly negligent, and that their actions evidence a "substantial lack of concern for whether an injury [could] result[ ]." MCL 691.1407(2)(c); MSA 3.996(107)(2)(c).

The majority emphasizes that the events leading up to the death were relatively chaotic. While this is certainly true, defendants were professionals who were trained to deal with chaotic situations. A jury might ultimately decide that the defendants were, in fact, justified in their actions. However, the question is not for this Court to decide. Rather it is asked only to determine whether there is sufficient evidence in the record to create a question of fact. I believe that plaintiff has produced enough evidence that reasonable minds could differ as to whether these defendants were grossly negligent.

Thus, I would affirm the judgment of the Court of Appeals and hold that plaintiff has presented sufficient

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summary disposition ruling. Nevertheless, even accepting the correctness of the majority's position, the passages in Harrison are still properly before this Court. The trial court had the opportunity to examine the evidence before it issued the order granting defendants' summary disposition motion. The trial court indicated its preference in entering an order granting summary disposition in favor of defendants during the November 22, 1996, proceedings. However, no order was entered until December 20, 1996. Plaintiff's motion for rehearing, along with an accompanying brief containing the quoted passages from Harrison, was filed with the court on December 10, 1996. Thus, the trial court had an opportunity to review this evidence before issuing the summary disposition order. The evidence is properly before this Court.

evidence of defendants' gross negligence to survive a motion for summary disposition.

B. *Reno v. Chung*

I agree with the majority that defendant's actions in this case clearly constituted gross negligence. However, I would hold that defendant owed a duty to plaintiff that supports a cause of action for gross negligence under the governmental immunity statute.

The majority maintains that defendant Reno owes no duty to this plaintiff. It bases that conclusion on the fact that she is statutorily required to perform autopsies and to testify in court for the prosecutor and had no "special relationship" with plaintiff. Slip op at 24. It concludes that "our Legislature has defined a medical examiner's duties. Nothing in the statutory scheme has created duties to a criminal defendant; instead, the duty is owed to the state." Slip op. at 26. The majority takes great pains to point out that this opinion is not to be read as extending the public duty doctrine.

However, the majority's pronouncements are strongly reminiscent of those in the lead opinion in *White v. Beasley*,[3] which stated that "[g]overnment employees should enjoy personal protection from tort liability based on their actions in conformity with, or failure to conform to, statutes or ordinances not intended to create tort liability." *Id.* at 319.

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[3] 453 Mich. 308, 357; 552 N.W.2d 1 (1996).

Indeed, owing a duty to the state or the prosecutor is synonymous with owing a duty to the public-at-large, as the state and prosecutor are representatives of the public. I fail to see the difference between the majority's "traditional" duty analysis and an untoward expansion of the public duty doctrine. The opinion essentially grants an absolute immunity to any government employee who has statutorily enumerated duties. Indeed, such a restrictive reading of duty goes beyond the public duty doctrine, which at least provides an exception for cases where a "special relationship" exists.

The opinion acknowledges that the statutory provisions outlining the duties of medical examiners do not delineate the examiner's duties in all cases. "There may well be instances of misconduct on the part of a medical examiner that are not implicated by the statute." Slip op at 24, n. 12.

However, the opinion makes no attempt to clarify this statement and explain why the unusual actions by defendant Chung in this case would not constitute such circumstances. Not only did defendant Chung negligently perform the autopsy, she took active steps to cover up her failures when the prosecutor and defense counsel tried to verify her findings. The majority provides no indication that the Legislature intended to protect medical examiners under such circumstances.

The majority opinion misconstrues the nature of plaintiff's claim. He does not allege that the defendant failed to perform her statutory duties; rather, he argues that she performed the autopsy in a grossly negligent manner, and that she tried to hide the evidence of it,

afterward. The difference is critical. Defendant owes a duty to the state to autopsy certain decedents. Plaintiff cannot hold her liable for failing to autopsy a certain body. However, once she pulls out the scalpel and makes the first incision, a duty to another may attach depending on how she performs her work.

The facts support the imposition of such a duty here. Determining whether a duty exists in a particular case is a question of law to be decided by the court. *Moning v. Alfono*, 400 Mich. 425, 436-437; 254 N.W.2d 759 (1977). In the past, we have considered various factors to decide whether the relationship between the actor and the injured party gives rise to a legal obligation on the actor's part. "In determining whether a duty exists, courts examine a wide variety of factors, including the relationship of the parties and the foreseeability and nature of the risk." *Schultz v. Consumers Power Co.*, 443 Mich. 445, 450; 506 N.W.2d 175 (1993) (citation omitted). In addition, we have examined the burden on the defendant and the nature of the risk presented. *Murdock v. Higgins*, 454 Mich. 46, 53; 559 N.W.2d 639 (1997).

In this case, the factors weigh in favor of finding an enforceable duty. The injury to plaintiff was actually and directly foreseeable to defendant. Before seeking defendant's professional opinion, the prosecutor specifically identified plaintiff and his account of Robin Reno's dying declaration. Under the circumstances, defendant was well aware that her opinion would play a major part in the decision to charge and incarcerate plaintiff. The performance of defendant's duties clearly affected plaintiff in a manner different from the general public.

In addition, the burden on defendant to perform her duties without gross negligence was minimal. Certainly it is to be expected that a medical person employed to accurately determine the medical cause of an unexpected death should be able to accomplish that task.

Moreover, the risk presented by defendant's negligence was serious. This court does not lightly regard the responsibility of ensuring that innocent persons are not wrongfully incarcerated, even for a short time.

Other states' case law supports a finding of duty here. For example, in *Lauer v. New York City*,[4] the court held that the plaintiff had stated valid claims for negligent and intentional infliction of emotional distress. There, a medical examiner failed to properly perform an autopsy and concealed information that caused the plaintiff to be wrongfully suspected in the death of his child. The court stated:

> Defendants' claim that no duty was owed directly to plaintiff is without merit. Even if, as defendants assert, the duty to perform the original autopsy in a responsible manner was owed solely to the public at large as a governmental function, when Lilavois later discovered his error, a duty was owed directly to plaintiff to transmit truthfully the information concerning his son's death, especially in light of his alleged knowledge that plaintiff was suspected of the homicide. [*Id.*][5]

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[4] 171 Misc.2d 832, 837, 656 N.Y.S.2d 93 (1997).

[5] Although the holding in *Lauer v. City of New York*, 1999 WL 448894, was later modified, it provides guidance here. Even if

In this case, defendant not only negligently failed to correctly perform the autopsies, she refused to cooperate with the prosecutor when he attempted to substantiate her findings. She forced the prosecutor to obtain a court order to examine forensic evidence, causing greater delay in the innocent plaintiff's release from incarceration. The circumstances in this case justify a finding that defendant owed a duty to plaintiff.

I also disagree with the majority's assertion that a finding of liability here will infringe the adversarial process. The majority characterizes the relationship between plaintiff and defendant as adversarial, defendant having sided with the prosecution during her court testimony at plaintiff's preliminary examination. What the majority disregards is that, while defendant ultimately became plaintiff's adversary in court, it was as a direct result of her gross negligence in performing the autopsy.

Moreover, defendant's actions in attempting to cover up her incompetence take this case out of the norm. But for defendant's original incompetence, and her subsequent attempts to hinder a discovery of the facts in the case, plaintiff and defendant would likely never have become adversaries. Holding defendant liable for her gross negligence in this instance would not prevent competent medical examiners from testifying fully. Rather, it

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the duty to perform an autopsy competently should be differentiated from the duty to correct medical records concerning the cause of death, defendant Chung could still be liable. Not only did she incorrectly perform the autopsy, she deliberately withheld the evidence of her negligence, thus causing defendant to remain wrongfully incarcerated.

would encourage them to take greater care in performing autopsies in the future.

Thus, I would reverse the judgment of the Court of Appeals and remand to the trial court for further proceedings consistent with this opinion.

/s/ Marilyn Kelly
/s/ Michael F. Cavanagh
/s/ James H. Brickley

97-1554
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SADIE MAIDEN, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF LEITH MAIDEN, DECEASED,	)	ORDER
Plaintiff-Appellant,	)	
v.	)	Filed July 13, 2000
HENRY JAMES ROZWOOD, ET AL.,	)	
Defendants-Appellees,	)	
PAUL LEONARD TROY,	)	
Defendant.	)	

BEFORE: GUY, BOGGS, and SUHRHEINRICH, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original

submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SADIE MAIDEN, as Personal Representative of the Estate of LEITH MAIDEN, Deceased,

Plaintiffs,

v

HENRY JAMES ROZWOOD, BETTY JO SZABO, PAUL LEONARD TROY, KARL DOUGLAS MYLES, SOUTHGATE REGIONAL CENTER, and the MICHIGAN DEPARTMENT OF HEALTH,

Defendants.
_____/

Case No: 97-CV-70325-DT

DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT DEFENDANTS SOUTHGATE REGIONAL CENTER & MICHIGAN DEPARTMENT OF HEALTH'S MOTION TO DISMISS BEFORE THE HONORABLE PATRICK J. DUGGAN
United States District Judge
251 U.S. Courthouse
231 West Lafayette
Detroit, Michigan 48226

(Thursday, April 10, 1997)

APPEARANCES:
REBECCA S. EATON, ESQ.
19390 West Ten Mile Road
Southfield, Michigan 48075
(810) 355-5555
Appearing on behalf of the Plaintiff.

SANTIAGO RIOS, ESQ.
Michigan Department of Attorney General
Mental Health Division
One Michigan Avenue Building
P.O. Box 30217
Lansing, Michigan 48909
(517) 373-3577
Appearing on behalf of the Defendants.

REPORTED BY:
MARIE JEDRESKI METCALF, CSMR
Official Court Reporter
251 U.S. Courthouse
231 West Lafayette
Detroit, Michigan 48226
(313) 962-3832

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EXHIBITS:

None offered.

[3] Detroit, Michigan

Thursday, April 10, 1997

At 2:19 p.m.

COURT CLERK: Civil action number 97-70325, Maiden versus Rozwood, et al.

MR. RIOS: Good afternoon, Your Honor. Santigao Rios on behalf of the defendants, Assistant Attorney General.

THE COURT: Counsel, let me suggest, if it's agreeable with counsel, that we proceed this way.

Your motion is pretty simple. The claim is barred by res judicata, correct?

MR. RIOS: That's correct, Your Honor.

THE COURT: Let me hear why plaintiff doesn't believe it is barred by res judicata.

MR. RIOS: Thank you, Your Honor.

MS. EATON: Good after, Your Honor. Rebecca Eaton appearing on behalf of the plaintiff.

As we indicated in our response, we have alleged allegations that are different – the state complaint alleged gross negligence and the gross negligence you get because of the governmental immunity issue. The complaint we filed in federal court alleges due process violations, alleges violations of civil rights, particularly excessive use of force, deprivation of life and liberty, things which even by [4] their elements in the jury instructions are different than gross negligence which was alleged and pled in the state court proceeding.

THE COURT: What's required for gross negligence?

MS. EATON: A showing that the negligence amounted to the level of a willful disregard.

THE COURT: Pretty close to the other, isn't it?

MS. EATON: I disagree, Your Honor. I think that the elements for – and I'm sorry I didn't bring the

jury instructions with me, but the elements, for example, use of excessive force, are different elements –

THE COURT: I appreciate that, but you're – if I buy your argument, if someone sues someone in an auto accident and alleges gross negligence and ordinary negligence, under your theory, you could sue them for the ordinary negligence, and then sue them again for the gross negligence, because the elements are different.

The theory may be different. What's the difference? Don't you – I mean, your office frequently files multiple counts arising out of the same transaction, correct?

MS. EATON: Yes, Your Honor, that's true.

THE COURT: And those multiple counts require different proofs, correct?

MS. EATON: Actually, in the state court [5] proceeding there was – I believe there was a count of negligence and a count of gross negligence.

THE COURT: My point is, your office files claims with multiple counts arising out of the same incident.

MS. EATON: Certainly.

THE COURT: And you agree that you may have to prove different elements depending on which count, right?

MS. EATON: Certainly, yes.

THE COURT: If I apply your theory, then you could take each one of those counts and file a separate lawsuit because they require different elements.

I can't believe any court is going to allow you to sue the first time for gross negligence, then we'll sue for ordinary negligence, next we'll sue again for the same action for intentional tort. As long as it's one transaction, the proofs are exactly the same. This incident happened as it happened. The defendants did whatever you believe they did, right?

MS. EATON: That's correct, Your Honor.

THE COURT: All you're saying is that in the state court that conduct amounted to gross negligence, and that's what you would have to prove. In this Court, that same conduct you're going to show violated all his constitutional rights, correct?

MS. EATON: Yes, Your Honor.

THE COURT: Why isn't that classic res judicata?

MS. EATON: Well, Your Honor, the issues – the federal issues were not litigated with the state case, as we pointed out, the court wouldn't allow us to amend our complaint to litigate those issues.

THE COURT: When did you seek to amend complaint?

MS. EATON: At the time of the summary disposition motion.

THE COURT: What do you mean, at the time?

MS. EATON: Actually it was at the time of entry of the order on the summary disposition motion.

THE COURT: Why did you wait until then?

MS. EATON: I don't think I can give you an answer to that, Your Honor.

THE COURT: The case had been pending about 11 months then, hadn't it?

MS. EATON: That's correct, Your Honor.

THE COURT: There had been a motion for summary disposition filed, right?

MS. EATON: That's correct, Your Honor.

THE COURT: Why wouldn't you have filed for leave to amend? Why wait until after you get the adverse ruling and then say, "Well, the Judge didn't allow us to amend." I'm not sure any Judge would or should if you wait until [7] I'm having great difficulty with your – because as an Officer of the Court, this is about as clear cut res judicata as I've seen, and I think your motion leaves something to be desired. For example – I mean your response, pardon me. We go to page two of your response, your brief, okay.

MS. EATON: Yes, Your Honor.

THE COURT: The second to last sentence on that page, are you with me?

MS. EATON: Yes.

THE COURT: "Therefore, the state court's order"?

MS. EATON: Yes.

THE COURT: See where I'm reading?

MS. EATON: Yes.

THE COURT: "Therefore, the state court's order granting defendants' summary disposition on an unrelated cause of action – " How could you, as an Officer of the Court, say that it is an unrelated cause of action?

MS. EATON: Well, Your Honor, as you put forth in the brief, the position we've taken is that this is a separate cause of action.

THE COURT: Didn't say that. How can you say it's unrelated? I think that's being less than honest. Causes of action can be different, we all agree with that, [8] but that doesn't mean they're not related. Clearly, this cause of action is related.

It just seems to me you clearly – your office clearly had an obligation to bring this claim in the state court. You waited until the state court ruled against you and then you said, "Uh-oh, we better do something about that, so I'll see if I can get the state court to amend it." That judge wouldn't do it, so you said, "Well, I'm going to try the federal court." Isn't that basically what happened?

MS. EATON: That would be the order of the proceedings, yes, Your Honor.

THE COURT: As I said, I understand your argument that it may require a different persuasion to the jury whether the conduct amounted to gross negligence or a violation of the constitutional rights, but the facts are identical. All you'd be talking about is persuading the jury with respect to whether or not it was one claim or the other and I think that's classic res judicata.

Anything further?

MS. EATON: Nothing, Your Honor.

THE COURT: All right. The Court will be issuing an opinion and order. The Court is satisfied that this claim is clearly barred by the doctrine of res judicata. I'll issue an opinion and order.

MR. RIOS: Thank you, Your Honor.

[9] THE COURT: Counsel both counsel address this. There is a defendant not represented here.

Are you aware of that, Counsel?

MS. EATON: Actually, as I was just sitting down when we started to talk I remembered that there is a defendant – that's true, there is a defendant who is not represented here.

THE COURT: What do you want to do about that?

MR. RIOS: Your Honor, it's my understanding that Mr. Troy was not – has not been served yet in this lawsuit, so –

THE COURT: Why do you understand that? How do you understand that?

MR. RIOS: Because normally all of the other defendants that were served request representation from the –

THE COURT: You're making an inference.

MR. RIOS: Yes, I am, Your Honor.

THE COURT: But you don't know that?

MR. RIOS: I do not know that.

THE COURT: You haven't seen whether there is a proof of service for him?

MR. RIOS: No, I haven't, Your Honor.

THE COURT: Counsel, what do you say about that?

MS. EATON: It's my understanding, Your Honor, [10] that he was served and that there should be a proof of service filed.

THE COURT: Okay. Therefore, where do we go from here?

MS. EATON: I guess I'll go back and have a default entered. I guess from my perspective, that's the next step for me.

THE COURT: The question I have is why haven't you established a default by now?

Seems like this case hasn't been given any extreme amount of attention. In any event, I have a defendant still remaining. I think the record reflects that he's been served, but that will be up to counsel to deal with it. If he's been served, then she can do whatever she wants with respect to him. If he hasn't been served, then the Court will deal with that at the appropriate time. I don't know anything else we can do with him at this time, right?

MR. RIOS: I don't think so, Your Honor.

MS. EATON: I agree, Your Honor.

THE COURT: I mean, you don't represent him?

MR. RIOS: No, I don't.

THE COURT: So if he's not been served, obviously that will – you know, there's a procedure for dealing with that, and if he has been served, then I'm sure plaintiff's counsel will do whatever is appropriate. Okay.

[11] MS. EATON: Thank you, Your Honor.

(At 2:29 p.m., proceeding concluded)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Marie Jedreski Metcalf 07/08/97

Marie Jedreski Metcalf, CSMR-3274